SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

No. 1197

BRYANT-BUCKNER ASSOCIATES, INC.,
Appellant,

v.

THE DANVILLE TOBACCO ASSOCIATION,
A CORPORATION, ET ALS.,
Appellees.

REPLY AND BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CASE CITED

United States, et al v. United States Smelting Refining & Mining Co., et al, 339 U.S. 186, 70 S.Ct. 537, 544 16

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INTRODUCTORY STATEMENT

In the courts below, both The Danville Tobacco Association and some of its warehouse members resisted, through their respective counsel, the claims of appellant, Bryant-Buckner Associates, Inc., and filed briefs on both appeals to the Fourth Circuit. Only one answer and brief in opposition is filed to the Petition for a Writ of Certiorari, but such answer is signed by all of counsel who appeared in the lower courts on behalf of their respective clients, who are appellees in this case.

For sake of brevity, when the appellant and the appellees are referred to, their respective names will be abbreviated as follows:

B. B.	Bryant-Buckner Associates, Inc.
Danville Warehouse	Danville Warehouse Company, Inc.
D. T. A.	Danville Tobacco Association
Lea-Love	W. Townes Lea and Louie W. Love, trading as Piedmont Warehouse and Hughes Warehouse
Motley's	Blair Motley and Latney Motley, Partners trading as Motley's Warehouse
Producers	Producers Warehouse Company, Inc.
Virginia-Carolina	Virginia-Carolina Warehouse, Inc.
Warren's	J. I. Warren and W. C. Warren, Partners trading as Warren's
App.	Appendix to Petition
Big Sale	Warehouse of Bryant-Buckner Associates, Inc., built in 1962
Fourth Circuit	United States Court of Appeals for the Fourth Circuit
F. T. C.	Federal Trade Commission
Joint App.	Joint Appendix—Record No. 9136

At the conclusion of the first trial before the District Court, two questions had been resolved by its final order:

> 1. The manner of allocating selling time among the warehousemen operating on the Danville Market, including B. B., and an established schedule of such allocation for the years 1962 and 1963.
>
> 2. A permanent plan for the reallocation of selling time in the future whenever the entry of a new warehouse or an addition to an old warehouse required it, together with rules and regulations for the operation of the Danville Market and its warehouses.

Appellant B. B. appealed from the decision on both questions. The Fourth Circuit affirmed the District Court as to the manner in which selling time was divided and scheduled for the 1962 and 1963 seasons, holding that the anti-trust laws had not been violated. Appellant made no attempt to petition for a writ of certiorari as to this decision made by the Fourth Circuit. Judge Bryan, in the opinion of the Court on the first trial, said:

> "We affirm the District Court insofar as it concluded that the temporary 1962-1963 plan did not embrace any breach of the anti-trust statutes. We suspend provisionally the order establishing the permanent plan, . . ." App., p. A3.

In the opinion of the Fourth Circuit on the second appeal, Judge Bryan said:

> ". . . Throughout this discussion it must be recalled that B-B's allotment was initially fixed by the interim plan employed for 1962, and that it was taken into the permanent plan as it became effective in 1963."

In discussing the permanent plan in the opinion of the Fourth Circuit on the first appeal, seemingly it approved this plan as fair and reasonable, and argument was made in support of it; but being somewhat cautious for the reason that the question as to the validity of the permanent plan involved administrative procedure, the Fourth Circuit remanded the case, directing the District Court to refer the record to F.T.C. for its study and recommendation as as to this permanent plan. The F.T.C. filed a lengthy report, expressing the opinion contrary to the Fourth Circuit and other circuits that any restriction or limitation imposed upon a new entrant to the Danville or any other market which was not applied to old members of D. T. A. or a board of trade governing such market was unreasonable and violative of anti-trust laws. F.T.C. actually set up in its report a schedule for allocation of selling time on the Danville Market, revising the 1962-1963 schedule which had become final. Both the District Court and the Fourth Circuit, on the second appeal, rejected the report of F.T.C. and approved the permanent plan formulated by Fred S. Royster, Special Master, dated November 29, 1962, and printed at length in Joint Appendix, page 110a.

The only question that can be raised by appellant, if a writ of certiorari is awarded it, is one of questioned validity of the permanent plan and the incidental question as to its right to a gain in selling time for the year 1965 under the permanent plan.

The question as to the validity of the permanent plan is actually premature and moot for neither B. B. nor any other old member of D. T. A. has applied for additional selling time based on new construction, and no new entrant has appeared on the Danville Market since B. B. became a member in 1962.

Judge Bryan, in the opinion of the Court on the second appeal, said:

> "B-B's apprehension as to the permanent plan appears to be premature and presently academic. However, as a member, B-B may have a right to contest the District Court's declaratory judgment upholding the permanent plan as a regulation of the Association enforceable upon future applicants. For this reason and to avoid any chance of incompleteness in our adjudication, as well as for comparison of the prevailing plan with the F.T.C.'s suggested plan, we undertake a discussion of the permanent plan."

This reply will briefly argue the validity of the permanent plan and the invalidity and inappropriateness of the report submitted by F.T.C. But beforehand, the Court's attention is called to the treatment of this case by F.T.C. in the face of the opinion of the Fourth Circuit on the first appeal and the state of confusion deliberately or inadvertently created by the manner in which this case has been briefed and argued by B. B. in the District Court on the second trial and on the second appeal to the Fourth Circuit.

QUESTIONS PRESENTED IN PETITION

The stated confusion is clearly demonstrated in the first question presented in the petition (p. 2). Without knowledge of the steps taken in this action in two complete trials in the District Court and two appeals to the Fourth Circuit, the first question presented by the appellant would possibly appear reasonable and pertinent. But this question was decided by the District Court and its decision was approved and affirmed in its entirety on the first appeal. No application for a writ of certiorari from this decision was

made, and it became final. Appellant raises no question of jurisdiction of the court and appellees admit jurisdiction. The affirmed order of the District Court, dated June 16, 1962 (Joint App., 72a), allocating selling time to appellant, a new entrant, is not and cannot be claimed to be void. Accordingly, appellant is finally and completely bound by the schedule of allocation of selling time established by the District Court in said order, and said Question 1. (one), as stated in the petition, is not before this Honorable Court in appellant's attempted appeal.

In the first opinion of the Fourth Circuit, the Court suspended provisionally the District Court's order establishing and approving the permanent plan and remanded the action, "with directions to the District Court to seek the advice of the Federal Trade Commission upon the validity and administration of the permanent plan." (Pet., A3) Judge Bryan, in his opinion for the Court on the second appeal, stated in regard to the referral to F.T.C., directed in his first opinion:

> ". . . In its response, the Commission found the *permanent plan* less than 'reaonable, fair and equitable,' and devised a wholly new formula." (Pet., A19 —italics ours)

But Question 2. (two), as stated in the petition (p. 2), is not confined to the permanent plan but extends to the whole field as it existed before B. B. was allocated 724 baskets under the schedule adopted, approved and affirmed, as set forth in the District Court's order of June 16, 1962 (Joint App., 72a). Thus, it is seen that F.T.C. exceeded its authority and overruled the Fourth Circuit in holding that the 1962 allocation, including 724 baskets to B. B., was fair and reasonable, and attempted to include in its

report a schedule giving B. B. approximately a 30% increase in selling time over that allowed by the District Court based on a warehouse of 268,000 square feet instead of 165,000 square feet actually built, which schedule was unconditionally approved by the Fourth Circuit. F.T.C. should have confined its report and recommendation to the permanent plan which affects alike all warehousemen on the Danville Market, including B. B. Accordingly, it is seen that F.T.C. has confused and confounded the two questions before the District Court in the beginning, one of which has been finally decided, and the other of which is confined only to the permanent plan which is before this Court on the petition and this reply.

Question 3. (three), expressed in bad taste and disrespectful of the federal judiciary and its established procedure, should not have been presented in the petition. Furthermore, this contention is hardly worthy of serious consideration. Mr. Royster previously had been recognized as a reliable authority on tobacco auction marketing and the conditions existing on the various market. See *Rogers* v. *Douglas Tobacco Board of Trade* (1957), 5 Cir., 244 F. 2d 471, 473. Appellees can make no better reply to this contention than did the Fourth Circuit in its first opinion wherein it said:

> "III. To impeach the decrees, attack is mounted by B-B upon the ground that the master appointed by the District Court was unqualified and disqualified. The argument is utterly unsound. It wholly misconceives his place in the suit. Besides, the appointment was made with the full knowledge and consent of B-B, even to the selection of the person to be master. True, he was not a lawyer, but the Federal Rules of Civil Procedure contain no such requirement. Rule 53(a).

"He was an official of the Bright Belt Warehouse Association who had testified in the case before his appointment and who testified thereafter. If B-B may object despite its contrary representation to the Court, still there was no error in his appointment and service. 'Master' was a misnomer. In truth he did not serve as a master in the sense of being a commissioner of reference or master in chancery. He did not take evidence; he did not resolve any factual disputes; he made no rulings of law. Impressed with his marked knowledge in tobacco marketing, demonstrated in his testimony, the Court chose him as an expert for its guidance. He was subject to questioning as a witness before and after his counseling advice to the Court. Rightfully, and with every propriety, he expounded to the Court and the parties the techniques of the subject in suit.

"It is a practice frequently resorted to in litigation, especially in patent and scientific cases. See Scott v. Spanger Bros., Inc., 298 F. 2d 928, 930 (2 Cir. 1962). Incidentally, he served without compensation and even enlisted the aid, on the same basis, of a competent and disinterested attorney to help him propound his views. All of this was known to the Court and to every party, without the slightest reservation by any of them, including B-B.

"The aspersions deliberately directed at the master in the briefs of B-B's counsel, attempting to impugn his motives, and the disparaging references to the trial judge, are entirely unfounded. We deplore such tactics and condemn them."

APPELLANT HAS NOT COME INTO COURT WITH CLEAN HANDS

This action is fundamentally a chancery proceeding, and the rules and maxims in such proceedings are applicable in this case. B. B.'s petition, at page 9, states:

> "All of Bryant-Buckner's allotments were calculated on its actual warehouse area, namely, 168,280 square feet; see district court order of July 7, 1962, at JA 94a; BB 19, n. 2; Federal Trade Commission's proposals at BB 36 and BB 37. The statement twice repeated in the second opinion of the court below (*infra,* pp. A24, A29), that Bryant-Buckner's allotments are calculated on the basis of the 268,792 square feet it has contracted to build rather than on the 168,280 square feet it has actually built, is contradicted by the cited record references."

This statement is not only misleading but is incorrect. The record shows that B. B. was released by its contractor of excess building of Big Sale Warehouse over 165,000 square feet, and that the District Court calculated B. B.'s selling time for the 1962 season based on a warehouse with a floor area of 268,792 square feet when this floor area was in actuality only approximately 165,000 square feet.

During the hearing on May 12, 1962, the District Judge said:

> ". . . A question arose in the discussion as to 'B & B' as to whether or not this can be done. The contract is for 262,500 feet but in an effort to work out a plan for 1962, it was the Court's view that it would not damage any of the present warehousemen if instead of building the larger building, that if they built on the basis of 165,000 feet that we should probably let them have an allotment of 734 baskets less a figure of seven baskets (a forced figure for the purpose of equalizing) to make the total come within the 8,800 baskets, which would give 'B & B' 726 baskets." (Joint App., 330a, 331a)

During the hearing on June 16, 1962, Mr. B. Andrew Davis, of counsel for B. B., said:

> "Now since we were here, if Your Honor please, it develops that we can't stop at 165,000. We are compelled from an economic standpoint—The contractor won't let us stop. We are compelled to build 265,000 square feet, and the allotment that was proposed on the basis of 165,000 square feet is not, in the opinion of Bryant-Buckner, reasonable and adequate and fair. That is the only reply that I want to make to Mr. Wheatley and Mr. Meade. We have never acted in disposition—never taken any position but in absolute good faith. If we had been able—we thought we could—if we had been able to cut our building back to 165,000 square feet, we would certainly have gone along and insisted that the 1962 allotment be accepted, but it develops that we can't do that, and Bryant-Buckner feel that the proposed allotment for '62 would not be reasonable and fair and adequate under those conditions. That is the only thing I have to state as to what we have agreed to and haven't agreed to." (Joint App., 394a, 395a)

In the order of the District Court dated July 7, 1962, in Joint Appendix, 94a, 95a, it is first stated:

> "This day came defendant Bryant-Buckner Associates, Inc., by counsel, and announced to the Court that it had been successful in reducing its commitments to its general contractors for the construction of its new warehouse for operation on the Danville tobacco market, so that when said warehouse is completed for use during the 1962 season it will contain approximately 165,000 square feet."

This order then recites the facts that at a special meeting of the members of D. T. C., held on June 28, 1962, fol-

lowed by a meeting of its Sales Committee on the same date, the membership approved the schedule for allocating selling time on the Danville Market for the 1962 season, established by the Court in its order of June 16, 1962, and that said Sales Committee had actually set up a schedule for the sale of tobacco at auction in the warehouses on said market, including an allotment of 724 baskets to B. B., and upon said facts decreed, ". . . that the Court doth approve of the reduction in floor space of the warehouse of Bryant-Buckner Associates, Inc. from 268,500 square feet to approximately 165,000 square feet, with the allocation of 724 baskets to it based on its reduced floor space of approximately 165,000 square feet for the 1962 season, . . ."

The quoted language of the District Judge, counsel for B. B. and the decree of July 7, 1962, clearly demonstrate that the above quoted statement in B. B.'s petition, at page 9, is entirely erroneous, and that B. B. actually was given a larger allotment of selling time than calculations on a floor space of 165,000 square feet entitled it to.

Had B. B.'s allocation been limited to its actual floor space of 165,000 square feet, with a full allowance for every square foot and without any restrictions, the baskets allotted (724) would have been practically the same as those allowed under the 1962 schedule, calculated upon the premise that Big Sale Warehouse would contain 268,782 square feet. Five years have passed since the 1962 allocation and there has been no addition to Big Sale or new warehouse construction by B. B. Each year, in March, the Sales Committee of D. T. A. has allotted 724 baskets to B. B. for the coming season, and during each season over said period it has operated its warehouse with this allotment.

B. B., supported by its petition, has not come into this Court with clean hands.

REASONS FOR REFUSING WRIT

The history and background of the unusual type and method of operation of the business of auction sales of bright leaf tobacco is clearly explained and described in Special Master's report (Joint App., 110a) and the two opinions of the Fourth Circuit.

It has been firmly established by the Fourth Circuit in said two opinions and cases cited therein that reasonable restraints upon new entrants on a bright leaf tobacco auction market do not violate anti-trust laws. In the case before this Court, both the District Court and the Fourth Circuit have held that the restrictions imposed upon appellant in establishing and approving the 1962 schedule of selling time do not embrace any breach of the anti-trust statutes. The decision of the Fourth Circuit on the first appeal, from which no petition for certiorari was filed, puts at rest any claim of appellant to a revision of the 1962 allocation for its benefit. The validity of the permanent plan, sometimes called the "Royster" plan or the "Danville" plan, is the only question now before this Court.

The appellant refers more than once to the original plan proposed by D. T. A. and the extent to which it would share in selling time under it, but this original plan is entirely extraneous to this appeal, and significantly, it was declared violative of anti-trust laws in the beginning of this action, upon B. B.'s vigorous opposition.

Appellant principally relies upon the reports of F. T. C. to reverse the well considered opinions of the District Court and the Fourth Circuit in this action.

F.T.C. REPORTS

The referral to F.T.C., directed by the Fourth Circuit, was only for the purpose of seeking the advice of the Com-

mission upon the validity and administration of the *permanent plan,* for it was stated in the first opinion that, "The orders of the District Court entered in regard to the 1962-1963 selling seasons are affirmed . . ." The Fourth Circuit did not direct that F.T.C. consider and express an opinion as to whether the restriction or limitation placed upon B. B. when it became a member of D. T. A., in 1962, violated anti-trust laws. Yet F.T.C. undertook in its report to express an opinion that any restriction violated anti-trust laws and that a new entrant should be treated precisely as an old warehouseman who had contributed to the buildup of the Danville Market as the second largest in the world. Furthermore, F.T.C. offered a plan or scheme of reallocation of selling time among the warehousemen on the Danville Market, including B. B., so as to radically change said original allocation to greatly benefit B. B.

The whole record in this action was forwarded to F.T.C., but no additional testimony was introduced before it, upon its consideration, and no hearing of any description was held, after convening the parties. In addition to the record, only statements requested of D. T. A. as to the size, type of construction and availability of warehouses on the Danville Market were considered by F.T.C. in making its report to the District Court.

When the original report of F.T.C. was received by the District Court at Danville, the Judge thereof wrote a letter under date of September 9, 1965, to F.T.C., requesting it to supplement its report relative to the allocation of selling time to tobacco auction warehouses by applying its recommendations to the Danville case. Thereafter, a supplemental report was forwarded by F.T.C. to the District Court at Danville, wherein F.T.C., in applying its proposed modified "Danville" plan, made an analysis

of the Danville Market and proposed an entirely different formula for allocation of selling time among the warehouses, including Big Sale, for the 1962 season and future seasons, thereby confounding the finally established schedule for selling time during the 1962 season with allocations for future years under a permanent plan. This analysis made by F.T.C. is found on pages 34 and 35 of B. B.'s Appendix to Brief, filed by it on second appeal.

The approach of F.T.C. in its original report to the District Court treated with two other cases and was couched in such general language that District Judge Dalton felt compelled to ask F.T.C. to file a supplementary report applying its recommendations to the Danville case only. The analysis of the Danville Market by F.T.C., in its supplemental report, predicated upon equality among new entrants and old warehousemen alike, is so involved that it is difficult, if not impossible, of understanding by judges as well as lawyers. The final result reached by F.T.C., based upon this equality, furnishes a new schedule for 1962 and for future years until there is new warehouse construction on the Danville Market.

Danville Warehouse, owner of four separate warehouses, with a total square footage of 296,453, and the oldest warehouse operator on the Danville Market, was allocated 1601 baskets per day under the 1962 allocation schedule approved by the District Court and finally approved and affirmed by the Fourth Circuit. Danville Warehouse in the past had not contributed to excessive warehouse construction but had actually demolished or disposed of two other warehouses which it had owned and had surrendered to D. T. A. the allotments which had been made to and used by it in the operation of said two warehouses. For some unknown reason or not understandable if given,

F.T.C., in its proposed modified allocation schedule, took from Danville Warehouse 251 baskets per day and increased the 1962 approved allotment to B.B. for its Big Sale Warehouse exactly 251 baskets. There was less severe adjusting and juggling of allotment figures among the other warehouses on the Danville Market.

If F. T. C.'s supplemental report should be accepted and applied, the result produced would be (1) an overruling of precedents established in the Fourth and other Circuits that reasonable restrictions on a new entrant to a bright leaf tobacco market do not violate anti-trust statutes; (2) an abuse and disregard of the mandate of the Fourth Circuit in its first opinion; (3) a reinstatement of a question finally decided by the Fourth Circuit, to which no petition for a writ of certiorari was filed; (4) an acceptance of an allocation schedule which is flagrantly prejudicial, unfair, inequitable and arbitrary as to one party in interest and at the same time highly beneficial, favorable and partial to another party in interest; and (5) the adoption of a scheme or plan, the reasons for which are not only ambiguous but are not understandable.

Appellant, on page 19 of its petition, states:

> "*Fifth.* Simply to show that the point has not been overlooked, we note that the first judgment of the court below directed a remand and a reference to the Federal Trade Commission (Appendix C(1); *infra,* p. A31); it was therefore not a final judgment. Consequently all of the points raised on the first appeal to the court below remain open now on review of the second appeal. *United States* v. *United States Smelting Co.,* 339 U.S. 186."

If we paraphrase this quotation so as to apply to the action before the Court, the appellant notes that the first

judgment of the Fourth Circuit directed a remand and a reference to the Federal Trade Commission, and therefore, its judgment was not a final judgment, and for that reason, all points raised on the first appeal to the Fourth Circuit remain open now on review of the judgment of the Fourth Circuit on the second appeal.

This statement completely disregards the constant fact from beginning to end that there were two questions to be resolved: (1) whether the 1962 allocation schedule was reasonable and therefore not violative of anti-trust statutes; and (2) the validity of the *permanent plan* treating with the allocation of selling time to be made in the future when a new entrant comes on the Danville Market or an old warehouseman constructs a new warehouse or makes a new addition to his existing warehouse. These two questions were treated separately in the District Court and in the Fourth Circuit on the first appeal, where Judge Bryan made it both clear and emphatic that the affirmation of the District Court's decision on the validity of the 1962 allocation was a final determination of that question and at the same time stated that the Court suspended provisionally the order establishing the permanent plan and remanded the action with directions to the District Court to seek the advice of F.T.C. upon the *validity and administration of the permanent plan.*

The only case cited in support of the quoted language of the petition with regard to the finality of the judgment of the Fourth Circuit is *United States et al* v. *United States Smelting Refining & Mining Co., et al,* 339 U.S. 186, 70 S.Ct. 537, 544, in which the Court said:

> "Finally it is contended that the District Court judgment should be affirmed because there was no appeal from the judgment and mandate when the case

was sent back to the Commission, the court having found that there was no evidence to sustain a Commission finding that the line-haul rates were not compensatory for the services rendered. Appellees argue that that decision became the law of the case.

"The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter. (Citing cases) It is not applicable here because when the case was first remanded, nothing was finally decided. The whole proceeding thereafter was *in fieri*. The Commission had a right on reconsideration to make a new record. (Citing cases) When finally decided, all questions were still open and could be presented. The fact that an appeal could have been taken from the first order of the District Court was not because it was a final adjudication but because a temporary injunction had been granted in order to maintain the status quo. This was an interlocutory order that was appealable because Congress, notwithstanding its interlocutory character, had made it appealable. 28 U.S.C. § 1253, 28 U.S.C.A. § 1253. The appellants might have appealed, but they were not bound to. We think that it requires a final judgment to sustain the application of the rule of the law of the case just as it does for the kindred rule of *res judicata*. (Citing cases) And although the latter is a uniform rule, the 'law of the case' is only a discretionary rule of practice. It is not controlling here. (Citing cases)"

The case cited by appellant to support its aforesaid conclusion is not an authority for declaring under the facts of the action before the Court that the adjudication of the validity of the 1962 allocation schedule by the Fourth

Circuit, in its first opinion, is not a final order or decree.

It is respectfully submitted that for the reasons stated in this reply and brief a petition for a writ of certiorari should be denied.

Respectfully submitted,

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ADDENDUM

By reason of the peculiar nature of the tobacco auction business, and in order to acquaint the Court with some of the background of this case, an addendum is appended to this Reply Brief, as follows:

Factors Controlling Selling Time

Leaf tobacco is sold on the warehouse floor on the Danville Market after it has been loaded or piled on a flat woven slat basket approximately 3½ feet square. It is recognized in the tobacco warehouse business that 20 square feet of warehouse floor space is consumed by each single basket of tobacco (App. 237a).

Selling time on the Danville tobacco market is expressed in terms of these baskets or piles of tobacco.

The total number of baskets, or piles, of tobacco available each day for allocation among the several warehouses is determined by several factors.

Tobacco cannot be efficiently judged except in proper light. Therefore, selling hours are limited to 5½ hours. Also, the factor of buyer fatigue makes any longer selling day inadvisable (Joint Appendix, first appeal, 303a).

It has been determined that in fairness to buyer, tobacco grower and warehouseman alike, the maximum speed at which the auctioneer should cry and sell tobacco on the warehouse floor is 400 piles per hour.

The 5½ hour day and the 400 pile per hour limit are set by the Sales Committee of the Bright Belt Warehouse Association, Inc., a voluntary association made up of tobacco warehousemen located in the area in which bright tobacco is grown and sold (Virginia, North Carolina, South Carolina, Georgia and Florida).

On the Danville market there are four sets of buyers; that is, each of the buying companies sends to the Danville

market four buyers. These buyers follow the sales in sets, a set being made up of one buyer representing each of the buying companies.

One set of buyers working the 5½ hours per day during which the piles or baskets are sold at the rate of 400 piles per hour, will buy 2,200 piles or baskets of tobacco (5½ X 400).

The four sets of buyers on the Danville market, therefore, will buy 8,800 piles, or baskets, per day; and these 8,800 piles, or baskets, represent the total "selling time" available on the Danville market for allocation and distribution among the operators of the Danville warehouses.

With 20 square feet being required to sell each single pile of tobacco, the 8,800 daily piles of tobacco could be sold on approximately 176,000 square feet of warehouse floor space; and in any event 100,000 square feet for each of the four sales per day or 400,000 square feet "would be ample" to sell the 8,800 piles per day on the Danville market (Joint Appendix, first appeal, 201a; 237a).

Thus, it may be seen that the necessity of allocating selling time among the several warehousemen on the local markets arises from many and varied reasons beyond the control of the local boards of trade and the Danville warehousemen.

For a fuller explanation of the reasons that many factors involved in the auction sale of leaf tobacco are beyond the control of the boards of trade and the warehousemen, see footnote 3 to the opinion in *Rogers* v. *Douglas Tobacco Board of Trade* (1957), 5 Cir., 244 F. 2d 471, 473, which Judge Rives said were "clearly and succinctly stated."

Floor Space Method of Allocating Selling Time

For some years previous to 1962, the total selling time available to the Danville tobacco market had been divided among the warehousemen on the basis of the ratio of floor

space of their respective warehouses to the total market floor space. It had become increasingly apparent during the years immediately preceding this litigation that the floor space system had serious defects, but none more menacing than the continuing increase of floor space by the warehousemen in order to increase their several proportions of selling time, rather than to meet any need for additional floor space on which to market tobacco. This continual over-building, frequently referred to as "building wars" had begun to threaten seriously the very existence of the tobacco auction market and thoughtful and responsible persons concerned with the marketing of tobacco realized that the situation had reached the point where there must be some restraint on operations in order to bring this devastating economic warfare under some reasonable control.

In the earlier days of restricted selling time, the problem was not so acute because there was no general surplus of warehouse space and because World War Conditions and their aftermath, from 1941 to approximately 1947, made the obtaining of building materials difficult. In those earlier days, the warehousemen on the market were either able to reach an agreement among themselves or they took the easiest course to solve the controversy by the allocation of selling time according to available warehouse floor space. This is the so-called "floor space system" which was almost universally prevalent until the late 1940's and was widespread at the time this litigation was commenced. When building materials became available and credit became easier in the late 40's and early 50's, and thereafter, there was an epidemic of new tobacco warehouse construction.

Events Immediately Preceding Litigation

The events which precipitated this litigation occurred early in the year 1962.

Appellant Bryant-Buckner Associates, Inc., joined the Danville Tobacco Association in February 1962 prior to the allocation of selling time in March for the 1962 sales season. At about the same time a spokesman for said Appellant was quoted in the local press as saying it was commencing construction on a warehouse consisting of approximately 167,000 square feet, which would be Danville's third largest tobacco warehouse (Joint Appendix, first appeal 195a).

Also, J. I. Warren and W. C. Warren, trading as Warren's Warehouse, who had been members of the Association and operating warehouses on the Danville market for a number of years, were commencing construction of a new warehouse with additional floor space of 140,529 sq. ft.

In making application to the Association for selling time for the 1962 sales season Appellant Bryant-Buckner Associates, Inc., first applied for selling time based on a warehouse consisting of 420,000 square feet, then later increased this to 500,000 square feet. Mr. C. D. Bryant, President of Appellant, testified that he read a letter to the Sales Committee of the Association which stated that it had been the intention of Appellant to apply for selling time on the basis of floor space of 165,000 square feet, but that due to the amendment in the by-laws which took place as of March 12, 1962, it was applying for selling time on the basis of 420,000 square feet. In his testimony Mr. Bryant was somewhat evasive and hard to pin down (Joint Appendix, first appeal 254-268) and in the course of it he mentioned 160,000 square feet, 161,000 square feet, 165,000 square feet, 250,000 square feet, 265,000 square feet, 420,000 square feet and 500,000 square feet in referring to the size of the warehouse Appellant might build for the 1962 sales season.

Association's Proposed New Method of Allocating Selling Time

Mr. Bryant claimed that the reason for the uncertainty as to the size of Appellant's proposed warehouse was the

new by-law change which would allow a new warehouse coming on the Danville market a credit of selling time of 40% for the first year and 15% additional for each year thereafter until 100% credit was reached.

The resolution adopting the new by-law, passed March 12, 1962 by the Association was never put into effect, but instead this litigation was commenced by a petition filed in the District Court seeking a declaratory judgment upon the validity under the Federal antitrust statutes of the proposed new by-law alloting selling time for the upcoming 1962 sales season, which would commence in September 1962.

The District Court held the new by-law of the Association to be "not in accordance with the law and * * * unfair and unreasonable."

District Court's Plan for 1962-1963

At the time of the District Court's disapproval of the Association's new by-law of March 12, 1962, the opening of the 1962 sales season was only a few months away (the Danville sales season opens around the middle of September each year) and it was apparent to the District Court and all parties concerned that, since the new by-law could not be properly used to allocate the selling time for the coming season, it was imperative that some workable and fair formula for the allocation of selling time to be used in the upcoming 1962 sales season be arrived at without delay.

At the instance of the Association and its warehouse members the District Court retained the cause and proceeded to formulate a plan of allotment for the 1962 season, and by its order of June 16, 1962, outlined a plan for the 1962 season which it considered acceptable, and which was adopted by the Association at a meeting on June 27, 1962.

The District Court's order of June 16, 1962 portioned out the selling time by this formula: the entire warehouse

floor space of the 1961 Danville market comprising 1,400,-450 sq. ft., was divided by the number of warehouses, then 16, reaching an average size of 87,527 sq. ft. This became the unit of space. With the addition of 140,000 sq. ft., added by the old member and 268,792 asked by B-B the total became 1,809,242. Division of this new total by the unit of 87,527 gave approximately 21 units. This meant that each unit carried with it 419 baskets (8,800 divided by 21).

Following substantially a schedule proposed by counsel for the Producers Tobacco Company, Incorporated, one of the warehouse parties to the suit, Bryant-Buckner Associates, Inc. (B-B), the new entrant, was awarded credit in full (419 baskets) for the first unit, 50% thereof for the second unit, and 25% for the third unit. B-B had contended it was bound by a construction contract to build a warehouse of 268,792 sq. ft. Later this claim was reduced to 165,000, the Court believing this area adequate in view of the fact that 400,000 sq. ft., had been quoted as sufficient to accommodate the entire market sales. This was done with the consent of B-B. However, in applying the formula the larger floorage was used, although the much lesser floorage of 165,000 feet, more or less, was actually built, thus saving B-B a capital expenditure for some 100,000 sq. ft.

On the basis of the larger floorage of 268,792 sq. ft., B-B was allowed a full credit of 419 baskets on the first unit of 87,527 sq. ft., 210 on the second and 105 on the third, an aggregate of 734. Slight adjustments resulted in a final figure of 724. After deduction of this number and the disallowance of a portion of the additional quota asked by the old member (Warren) on the basis of its new construction, the remainder of the basket-maximum was distributed on the floor space percentages of 1961.

In the formulation of this plan the Court was assisted by counsel appearing for various parties, and there was necessarily some give and take between them.

The Permanent Plan

At the instance of the Association and its warehouse members, the District Court retained the cause still further for the purpose of arriving at an acceptable plan for the allotment of selling time for the 1963 sales season and the years thereafter; and on May 12, 1962, the Court appointed Fred S. Royster as Master to report to the Court upon findings of fact and conclusions as to the issues presented in the case and particularly a formula for the allotment of selling time for the tobacco warehouses in the Danville area for 1963 and subsequent years (Joint Appendix, first appeal 54a, 55a).

The Master, so appointed filed his report on November 29, 1962, in which he recommended a permanent plan of regulations for the allocation of selling time on the Danville market. The District Court confirmed this report and recommended that the plan set forth therein be adopted by the Association. B-B excepted to the report. The Association adopted the permanent plan on March 16, 1963, at the usual time (second Tuesday in March) the Association adopted its schedule for the allotment of selling for the upcoming sales season commencing in September of each year. Later, the Association voted to continue the 1962 plan in effect for the 1963 season and to postpone the effectiveness of the permanent plan until the 1964 season, in keeping with a Supplemental Report of the Master so recommending for reasons stated therein, which was aproved by the District Court. Thereafter, the 1962 plan has been referred to as the 1962-1963 plan.

The permanent plan sometimes also known as the "Danville Plan" provided for the allocation of selling time on a combination unit and performance system. Under this plan the number of warehouses on the Danville market was first divided into the total warehouse floor space on the market in order to arrive at an average unit of floor space per warehouse. This produced an average unit of space of approximately 87,500 sq. ft.

Then, under the permanent plan, a new entrant would be accorded a credit of 75% for the first unit of space in his warehouse (75% of the first 87,500 sq. ft.); a credit of 50% for the second unit (50% of the second 87,500 sq. ft.); and a credit of 25% for the third unit and all additional units, if any, in excess of three.

Likewise, should any added units be constructed on the market by a warehouseman already on the market, either by the addition to an existing warehouse, or a new structure, credit would be given as follows: for each unit of 87,500 sq. ft., added to an existing unit of 87,500 sq. ft., a credit of 50% for such added space; and for each unit of 87,500 sq. ft., added to exising space of 175,000 sq. ft. (2 units) a credit of 25% for such added space.

In all computations under the plan a fraction of a unit, less than 87,500 sq. ft., would be given a proportionate credit.

In addition, the permanent plan made provision for a plus or minus of 8% gain or loss based upon performance during the preceding sales season.

First Appeal

The 1962-1963 plan evolved by the District Court and the permanent plan recommended by the Master and approved by the District Court (both adopted by the Association)

were the subject of the first appeal in this case to the 4th Circuit Court of Appeals.

The case was heard in the 4th Circuit Court of Appeals on January 14, 1964 and decided on May 14, 1964, the decision being reported as *Danville Tobacco Association v. Bryant-Buckner Associates, Inc.*, 333 F. 2d 202.

On the first appeal the Court reviewed the permanent plan approved by the District Court for 1964 and subsequent years and stated that the authorities approve the kind of restrictions contained in the permanent plan when reasonable. However, this Court suspended pro tempore so much of the decree of the District Court as finally approved the permanent plan, and remanded the cause with directions to the District Court to refer the permanent plan forthwith to the Federal Trade Commission, requesting it "to investigate and advise the Court upon the validity of the proposed plan or to prescribe an appropriate plan."

Proceedings on Remand

Pursuant to the remand mandate of the Court of Apeals the matter was referred, in July 1964, to the Federal Trade Commission with request by the District Court that comments and advice be given as to the propriety of the prospective plan.

A report of 24 pages was made by the Federal Trade Commission in May, 1965.

Because of difficulty in determining just what the Federal Trade Commission advised with respect to a prospective plan of operation, the District Court requested the Federal Trade Commission to clarify and make more specific its Report and advice, if it cared to do so.

Thereafter, on October 16, 1965, the Federal Trade Commission furnished to the District Court a Supplemental Re-

port of 8 pages making certain recommendations. The First Report and the Supplemental Report of the Federal Trade Commission are in the record (App. for Appellant, present appeal, pp. 15 et seq. and 32 et seq.).

After notice to all of the parties to the proceedings, there was a hearing on November 1, 1965, on Exceptions which had been filed to the Reports and Recommendations of the Federal Trade Commission.

After hearing all parties who desired to be heard, the District Court entered an Order referring the matter of the Federal Trade Commission Reports and Recommendations to Mr. Fred S. Royster, the Special Master, for study and comment and recommendations.

The Second Report of Special Master Royster was filed on December 1, 1965, and is printed at pages 38 to 52 in Appendix for Appellant, this present appeal.

After notice to all of the parties, there was a hearing at Danville on January 21, 1966, on the subjects of the Federal Trade Commission Reports and Recommendations, the Special Master's Reports and Recommendations, and the action to be taken by the District Court. All of the parties and persons desiring to be heard were heard at that time and place.

Judgment of District Court

On February 9th, 1966, the District Court rendered its final judgment in the language as follows:

> "That the Court declares as its Declaratory Judgment that the allocation of selling time and the handling of selling time as recommended in the First and Second Reports of the Special Master and as heretobefore adopted by the Danville Tobacco Association and as now in effect constitute a proper and legal manner of

allocating selling time both as to the warehousemen now on the Danville market and as to a new entrant who may present himself thereafter; and that said regulations are not illegal or improper and are not unreasonably discriminatory and do constitute proper and legal method of allocating such selling time for the tobacco season of 1966-67 and for future seasons thereafter and until they may be changed in whole or in part by proper action of the Danville Tobacco Association or its successor, or by proper decree of a Court with jurisdiction over the matter."

It is from the above Judgment of the District Court that Appellant took its second appeal, and on the second appeal the 4th Circuit Court of Appeals affirmed the judgment of the District Court, and this action by the 4th Circuit Court of Appeals is the basis for the petition for a writ of certiorari.

Permanent Plan Is Fair and Reasonable

This Court, including the former appeal in this case and the Fifth Circuit as well, have heretofore clearly recognized the rightfulness of a diminution as to a newcomer on the market. *Asheville Tobacco Board of Trade, Inc.* v. *FTC*, 263 F. 2d 502 (4th Cir. 1959); *Asheville Tobacco Board of Trade, Inc.* v. *FTC*, 294 F. 2d 619 (4th Cir. 1961); *Rogers* v. *Douglas Tobacco Board of Trade*, 244 F. 2d 471 (5 Cir. 1957); *Rogers* v. *Douglas Tobacco Board of Trade*, 266 F. 2d 636 (5th Cir. 1959); *Danville Tobacco Association* v. *Bryant-Buckner Associates, Inc.*, 333 F. 2d 202.

There are several acceptable and sufficient reasons why a new warehouse entrant on the Danville market should be limited to some extent as to the amount of selling time initially allotted to him.

The older warehousemen have for many years spent a great deal in time, effort and money to build up the Danville

market—in advertising and promoting the market through personal contacts, through road signs, newspapers and radio, until it has reached a top position among tobacco auction markets and has earned an excellent reputation for fair dealing with farmers and buyers. To none of this has the newcomer contributed, yet he reaps the benefit of these years of effort and must get his selling time through decreases in the selling time of the existing warehousemen, since there is no other place for it to come from. In the case of the grocery business or the professions and most other lines of endeavor, a newcomer opens a store or an office and has to attract customers, or clients, or patients, by his own worth, or ability, or enterprise. Those already in business do not have to hand him free on a silver platter a supply of customers or clients, to set him up in business. Yet, that is just what happens when a newcomer enters a tobacco market, regardless of his experience, ability or worth.

The marketing of tobacco, therefore, cannot be equated to the grocery business, the professions, hotels, office buildings, or indeed to any other business; but must be regarded as unique with respect to the controls and restrictions which must be placed upon it.

These Appellees do not contend that a newcomer should be or could be, excluded from the market, or unreasonably limited as to an allotment, but on the other hand no individual, group of individuals, or corporation can claim the right, just because they may happen to be in financial position to do so, to create a situation where some of the pre-existing operators may be literally forced out of business, which has happened on some other markets (Joint Appendix, first appeal, 284a).

The Danville market is presently saturated with warehouses and floor space to the point of being on the brink

destruction. Therefore, for the welfare of all, the farmer, the buyer, the public and the warehouse business, some regulation and control of future building of or additions to warehouses, applying to existing warehousemen as well as to newcomers, is not only reasonable, but imperative (Joint Appendix, first appeal 305a).

The Special Master's Plan, adopted by the District Court for 1963, and subsequent years, which is a combination of unit floor space and experience or performance, is admittedly not perfect—it is not even claimed by its author to be so (Joint Appendix, first appeal 300a)—but it is reasonable to believe that it will prevent a runaway, chaotic condition from descending upon the Danville Market, which was imminent at the time the Petition for Declaratory Judgment was filed in this cause and which has happened elsewhere in the Bright Belt for the lack of such a control plan (Joint Appendix, first appeal 284a; 300a; 305a).

The Special Master showed that he was familiar with pertinent prior court decisions in which various aspects of tobacco marketing were involved and the plan he recommended shows plainly that he took guidance from them in order that the plan would conform to the ruling principles established by the Courts.

It is pertinent at this point to observe that, in any event, the District Court has not in fact forced on anyone the plan for 1963 and subsequent years. It has done no more in effect than to say to the Danville warehousemen that it decrees the plan to be fair and reasonable and they were willing to adopt it for that reason. It has not said that it is the only plan conceivable that would be fair and reasonable, or that there may not be others that would be better.

These Appellees also contend that the plan for 1963 and subsequent years, while not entirely satisfactory to them in all respects, is reasonable and perhaps as good a plan as

might have been arrived at. Certainly it is better than the warehousemen, left to their own devices, could devise. Common sense dictates that a bona fide attempt to live under it for a reasonable length of time should be made by all concerned. If experience under it should not prove its now apparent virtues, it can be amended or supplemented as the need may arise.

Previous Circuit Court of Appeals Ruling Upon Reasonable Restraint Upon Allocation of Selling Time

Appellants freely admit that both the Fourth and Fifth Circuit Courts of Appeal have consistently held that a reasonable diminution of selling time allocated to new warehouse construction in a market is not an unreasonable restraint of trade. *Rogers* v. *Douglas Tobacco Board of Trade,* 244 F. 2d 471 (C.A. 5); *Rogers* v. *Douglas Tobacco Board of Trade,* 266 F. 2d 636 (C. A. 5); *Asheville Tobacco Board of Trade* v. *FTC,* 263 F. 2d 502 (C. A. 4); *Asheville Tobacco Board of Trade* v. *FTC,* 294 F. 2d 619 (C. A. 4); *Roberts* v. *Fuquay-Varina Tobacco Board of Trade,* 332 F. 2d 521; *Danville Tobacco Ass'n* v. *Bryant-Buckner Associates,* 333 F. 2d 202 (C. A. 4) and *Danville Tobacco Ass'n* v. *Bryant-Buckner Associates,* C. A. 4, No. 10579.

Appellants, however, point out that it is an unreasonable restraint to foreclose competitors from a substantial part of the market. With this we agree, particularly where the motivation and intent is to reduce or exclude competition. To support their contention that the Fourth and Fifth Circuit Courts of Appeals erred in the above cited cases, the Appellants cite *Bale* v. *Glasgow Tobacco Board of Trade,* 339 F. 2d 281. The plan for the allotment of selling time in this case was vastly different from those con-

sidered in the above cited cases considered by the Fourth and Fifth Circuit Courts of Appeals. In the Bale case the Glasgow Tobacco Board of Trade adopted a regulation which limited the selling time of a new warehouse to 20% of the selling time which would have been allotted to the warehouse on a basis of a floor space allotment system (where a warehouse receives that proportion of the selling time which its floor space bears to the total floor space in the market). The Glasgow Board of Trade regulation provided that the new warehouse would thereafter receive annually an additional 20% of the selling time which would have been allotted under the floor space allotment system until the new warehouse, after five years, was on a parity with the other warehouses in the market. The Court held:

"We are of the opinion that the purpose and intent of the twenty percent rule was to preserve the status quo and suppress competition. . . .

". . . As heretofore stated, the question of whether a restraint is reasonable or unreasonable depends on the particular facts of each case. . . ."

Obviously, the factual situation with which the Sixth Circuit Court of Appeals dealt in the Bale case is so different from those considered by the Fourth and Fifth Circuit Courts of Appeal, that the Bale case has no relevancy to the case at bar, nor is it in conflict with the decisions of the Fourth and Fifth Circuit Courts of Appeals. In fact, The Danville Tobacco Association, in an effort to deter wasteful building wars, adopted a regulation similar to that adopted by the Glasgow Tobacco Board of Trade in the Bale case, whereby new warehouse space would be allotted 40% of the selling time allotable under the floor space allotment system with an annual 15% increase. The

District Court held that this regulation unreasonably restrained trade, and proceeded to formulate the regulation which is the subject matter of this case.

Appellants further cite *Gamco, Inc.* v. *Providence Fruit & Produce Bldg.*, 194 F. 2d 484, in support of their contention that the regulations of the Danville Tobacco Associations are an unreasonable restraint upon trade. This case, however, deals with a produce market where there was a complete exclusion of competition from the market, and thus has no relevancy to the case at bar nor does conflict with the decisions herein cited of the Fourth and Fifth Circuit Courts of Appeal.

Upon the first appeal of the case at bar (333 F. 2d 202), the Fourth Circuit Court of Appeals held that it would not be an unreasonable restraint of trade for the Danville Tobacco Association to operate under its permanent plan until the FTC could review the plan.

In fact the Court, then, did not disapprove the permanent plan in its first opinion; but rather it would seem from this Court's comments on the permanent plan as a whole, that the permanent plan might be an acceptable plan, but that the Court's outright approval should be withheld pending some further exploration and study to ascertain whether or not it could be improved. The Court indicated its feeling that neither the 4th Circuit Court nor the District Court possessed the expertise to enable either to be sure that the permanent plan was the best that could be devised under the circumstances of this case. Hence, although the Court already had the benefit of the advice and recommendations of Mr. Royster, who perhaps has an expertise quoad tobacco marketing second to none, the Court nevertheless deemed it salutary to see if any additional help could be had from the FTC.

FTC's Assignment

These Appellees do not apprehend that the Court intended the FTC to act without any limitation whatsoever in performing its assignment.

It is reasonable to conclude that this Court might have had in mind that some help might be had from the FTC on the question whether the 75% limitation on the first unit of the new entrant was too much of a limitation; or whether the 50% and 25% limitations should be increased or decreased as to a new entrant or to an old member of the market seeking additional construction; or as to whether the 8% gain or loss limitation was too much or too little. But it is not reasonable to conclude that this Court had in mind that the FTC would undertake, or presume, to advise the Court that no limitation whatever can legally be imposed on the new entrant in the face of its prior decisions.

It is more reasonable to conclude that this Court assumed that the FTC would acknowledge and accept the previous decisions squarely holding that some restraint may be imposed on a new entrant if it is not unreasonable, and use that as a starting point in investigating the permanent plan.

This the FTC did not do, but instead, flatly maintained that any plan that limited a new entrant at all was an unreasonable restraint of trade, directly contrary to the previous rulings of the Fourth and Fifth Circuit Courts of Appeal. Obviously, the FTC does not feel that the prior decisions of this Court are binding upon the FTC and further feels that this Court should reverse itself on this well settled point.

The District Court had no choice but to reject the advice of the FTC based on any such premise.

It is conceded that this excess of unused and unneeded space is a direct result of allocating selling time solely on the basis of floor space, which gave rise to a building contest, and is the principal evil that the Association was attempting to arrest by the amendment of its by-laws on March 12, 1962, and which the District Court dealt with in its Order of June 16, 1962, fixing the allotments of selling time for the 1962 sales season and in its Order of March 6, 1963, promulgating a permanent plan for controlling the allotments for the sales seasons of 1963 and subsequent years.

However, nothing but complete chaos could result from any such radical procedure as undertaking to uproot and undo everything that has developed on the Danville market over a period of some thirty years or more. It is impossible to "turn back the clock" and try to decide this case on the basis of the situation that existed before the overbuilding occurred and arrive at any fair or workable result.

Admittedly under the application of the "rule of reason," the older warehousemen cannot be permitted to exercise their rights in total disregard of the rights of a newcomer, but they are not without some rights in the matter and, by the same token, rights cannot be accorded a newcomer which are in total disregard of the rights of the older warehousemen.

These Appellees assert that any "solution" of the problem existing on the Danville market which does not use the existing situation as a starting point and work from there, is purely theoretical—a "paper solution" only—which if rigidly applied would certainly disrupt a large and important segment of the economy of the southeast, resulting in irreparable damage to the farmer, the public and those engaged in the trade. Such a "solution" would be like the

situation in which the operation was a success, but the patient died.

The District Court had no choice but to deal with the situation on the Danville market as he found it at the commencement of this litigation.

The Matter of Expertise

It is respectfully submitted that the FTC's approach in making its recommendations in this case indicate that it does not fully comprehend all of the peculiar aspects of the tobacco marketing business. The suggestion arises that the FTC is inclined to place a greater value upon theory than upon practice. In its reports in this case it has firmly embraced what it deems to be the ideal to the exclusion of what is, in practice, possible or workable. It seems to believe that new wine may be forced into old skins without causing any disastrous results.

It seems permissible to oberve that the FTC might have used the "wrong end of the telescope" in viewing this case. The problems presented in this case cannot be fairly solved when only viewed from afar. The expertise necessary to recommend a workable plan which will be fair to all parties can only be acquired through long and broad experience in the milieu of the tobacco trade. It is not believed that the gentleman or gentlemen who prepared the FTC reports in this case can lay claim to any such wide and varied experience, as to the tobacco trade. It appears that he or they, might have overlooked the fact that what may be a fair and workable plan in one trade or industry might be wholly unsuitable in another—particularly the trade or industry involved in this case.

It is respectfully suggested that the District Court, and the 4th Circuit Court, already have had the benefit of the

best obtainable expertise to handle the matter in hand in the person of Mr. Fred S. Royster, who was aided by a competent and disinterested attorney, both of whom had had broad experience with the workings of the tobacco market.

Mr. Royster's marked knowledge in tobacco marketing was demonstrated in his testimony given in this case prior to his having been appointed Master and afterwards. He had testified in a number of previous cases and had been recognized as a reliable authority on tobacco auction marketing and the conditions existing on the various tobacco markets. See Rogers v. Douglas Tobacco Board of Trade, 244 F. 2d 471, 473 (5th Cir. 1957).

While the District Court itself, unaided, could not be expected to have evolved an acceptable plan, it could and did evolve an acceptable plan after having had the best advice obtainable anywhere in the tobacco business.

None of the parties are entirely satisfied with the District Court's rulings in this case, but they believe them to constitute a reasonable and fair effort to resolve a most difficult and troublesome problem existing on the Danville market and are willing to accept them with as much grace as possible for the common good. If one single party to this suit had been completely satisfied with the District Court's rulings, that in itself would have been proof that the rulings were not fair and reasonable. The situation was such that it was impossible to arrive at a solution that would please everyone, or indeed anyone, concerned.

It is understood that the opinions of the FTC are generally given weight, but in the present case the opinions of Mr. Royster and his counsel are entitled to be given at least as much weight. The FTC is of course not a court, but rather a governmental agency from whose decisions an aggrieved party may appeal to the courts.

Neither the District Court nor counsel in this case are ungrateful for the efforts of the FTC performed at the invitation and direction of the 4th Circuit Court of Appeals. All parties concerned share the view that all possible help should have been enlisted in solving the problems in this case. However, with all due respect to the FTC, its recommendations simply did not prove to be the help that it was thought they might have been, and the District Court was therefore justified in not accepting them.

Analysis of FTC Recommendation

While the expert knowledge and experience of Mr. Royster, the Special Master, (as pointed out by the Fifth Circuit Court of Appeals in *Rogers* v. *Douglas Tobacco Board of Trade*, 244 F. 2d, 471, 473) is undenied, neither the District Court nor the litigants had even the vaguest idea as to what knowledge or experience the employee of the FTC, who wrote the report and supplement, had in the tobacco business. No evidence was taken by the FTC representative, no survey of the market was conducted and no hearings were had whereby the suggestions of the FTC advisory could be subjected to the test of logic, experience, or criticism. In fact, the first advisory was so vague and so filled with ambiguities that the knowledge of the author of the report came under serious question. When the requested supplemental report was submitted by the FTC, the illogical conclusions of the author made it clear that the author was a mere theorist without any practical knowledge of the interworkings of the tobacco business.

Little could be added to the coldly logical dissection of the FTC recommendations performed by Mr. Royster in his "Report and Recommendation" as to the FTC reports. Here Mr. Royster points out that the FTC recommends

a complete redistribution of selling time among established warehouses, which have made no complaint about their allotments. This would simply upset the balance which has been established in the market by purely artificial means, giving some warehouses selling time which they have not requested and taking the selling time from others who have had no responsibility for the over building problem. So, rather than taking the market as it existed at the time that Bryant-Buckner entered it, the FTC now seeks to create complete chaos in a well ordered business by rearranging the selling time on a purely theoretical basis.

Next, as Mr. Royster pointed out, a new entrant would come into the market with a bonus of selling time. That is to say, that the new entrant would receive more piles for a single unit than would be allowed existing warehousemen for the same amount of space.

In short, the entire report is shot through with gross inequities, illogical theory and a complete lack of knowledge and understanding. All of which cries out that the author lacks any firm understanding of marketing problems.

The most glaring inequity suggested by the FTC, however, is its overall treatment of new entrants in relationship to the established warehousemen, who have built the Danville market. Here the FTC would take the market back to the very evil which everyone agrees should be remedied —that of allotting selling time on a floor space basis, modified only to the extent that it virtually precludes the existing warehouseman from retaining his relative position in the market. Such a plan would not be in the public interest because it encourages wasteful building. Such a plan would be grossly unfair to existing warehousemen who would have to surrender their selling time to any new entrant without any effective way to recoup it.

In short, the FTC proposal is to permit any new entrant to come into the market with a single unit of warehouse on a full parity with existing warehouses. The selling time thus assigned to the new entrant is deducted pro-rata from the existing warehouses. If an existing warehouse finds that it cannot economically operate with its reduced selling time, it can only acquire more selling time by building more space; however, in building more space to survive in the market it is at a complete disadvantage. If it has one unit in the market it gets only 75% credit for a second unit, 50% credit for a third and 25% credit for the fourth unit. This is obviously an invitation to everyone who can build a warehouse to come into the market and dismember the existing warehouses. New warehouses would mushroom in the market, while the older warehouses would molder in ruin because their life blood has been sapped away by the new entrants. Such a plan would simply accentuate the very evil which the District Court has sought to remedy—the wasteful building of unneeded warehouse space, and millions of square feet of unused and unnecessary warehouse space would be constructed.

The unfairness of the FTC proposal to existing warehouses is shocking. It must be remembered that tobacco markets do not just happen—they come into existence and expand through the efforts, energies and promotion of the warehousemen. The Danville market has been developed into at least the second largest flue cured market in the nation by the efforts of its present warehouse interests. Now the FTC proposes that any person who has made no contribution to the market should be permitted to come into the market, build a warehouse, and receive the same credit for the first unit of warehouse space as any of the existing warehouses. The only place from which the selling

time allotted to the new entrant could come would be from the existing warehouses. Up to this point the FTC has taken us back to the old and inequitable floor space plan. But now, to accentuate the inequities, the FTC would penalize the very warehouses, whose personnel built the market, by reducing the credit which they might receive for new construction, giving only 75% credit for a second unit, 50% credit for a third unit and 25% for a fourth unit. Such an unfair plan rewards the warehouse which has participated in promoting the market by rendering it powerless to compete for selling time with the newcomer who has done nothing for the market, and so the old warehouses are defenseless as opportunists swarm into the market to drain off their selling time and wreck them financially.

Here the farmer, for whose convenience the warehouses exist, has no appreciable opportunity of selectivity. He must go to the warehouses which have the selling time. As the selling time of his preferred warehouse flows to newcomers in the market, he must follow the selling time, no matter how little knowledge the newcomer has of selling tobacco or what accommodations are offered him.

Another evil which would arise by opening the Pandora's box of the FTC would be the reduction of the buyers' efficiency by the dissolution of existing consolidations and partnerships and the entry into the market of a multiplicity of new interests. Through the consolidation of warehouse interests in the past, the selling time is utilized in the fewest geographical locations as possible, so that the least amount of time will be wasted by the buyers in traveling from warehouse to warehouse. Under such a plan as proposed by the FTC, there would be an immediate dissolution of consolidations and a division of the selling time

by existing interests in an effort to divide themselves into the smallest possible units for self preservation against the favored newcomer to the market. This would mean that sales would be held in every warehouse in the market so that so much time would be wasted by the buyers in traveling from warehouse to warehouse that it would be impossible for the buyers to buy the 8,800 piles daily allotted to the market.

It is hard to believe that the Congress ever intended that such inequities should grow out of the Sherman Act, which was designed to promote commerce rather than stifle it.

Just why the warehouse interests, which developed and promoted the market should be penalized and the new entrant, who has contributed nothing to the market, should be given preferential treatment, is difficult to understand. The author of the FTC report has certainly indulged in a strange brand of logic.

It was also apparent that the system of allotting selling time on a basis of floor space endangered free trade and tended to create monopolies in the market. The warehouseman with the economic power to build vast warehouses could squeeze his competitors out of the market, garner up the selling time and sell the 8,800 piles for the farmer on his own terms.

The plan recognized the concept of free enterprise, in so far as it can be recognized in a business which of necessity must be strictly regulated and coordinated. During that period which follows the peak of the selling season, when the farmers' demands for selling space does not exceed the allotted 8,800 piles per day, the market reverts to free enterprise, and the farmers can then be selective as to the warehousemen with whom they sell their tobacco. During this period some warehouses sell fewer than their allotted

piles. This creates additional time for the buyers to buy a larger number than those allotted in another warehouse. This time unused by a warehouse, with fewer than its allotted number of piles on the floor, is known as "free time," and is utilized then by warehouses with more than their allotted number of piles on the floor. At this stage in the selling season, the warehouses are operating in free competition with one another, and the farmer then makes his selection of warehouses on a basis of facilities and service.

The plan credits the industrious and enterprising warehouseman with any increased sales resulting from the use of "free time," and he will then be entitled to an increase in his allotment of selling time in the next marketing season not to exceed 8%. Thus, the Royster plan rewards the industrious warehouseman for his extra efforts. This provides the machinery for the constant shifting of selling time to the warehouseman who provides the best facilities and renders the best service to the farmer, so long as he does not resort to unfair practices in inducing farmers to bring tobacco to his warehouse.

We must assume that the Congress intended that the Sherman Act should promote commerce rather than deter it. We must assume that the Sherman Act was designed to permit a reasonable regulation of trade where it is in the best interest of commerce, rather than prohibiting any regulation of trade and thereby bringing on commercial chaos.

Because of the perishable nature of tobacco, because of the limitation upon the number of tobacco buyers in a given market, because of the limitation upon the length of the selling season, because the limitation upon the number of piles of tobacco which can be sold in a day, because of the

limitation upon the redrying facilities of the buying companies, and because of the limitation upon the number of government graders in the market, there must be reasonable regulations imposed upon the processes of selling tobacco which necessarily promote commerce in tobacco by avoiding chaotic conditions which would destroy commerce in tobacco. It has been recognized that reasonable regulations are necessary to promote the orderly sale of tobacco, and such regulations have been promulgated by the Bright Belt Tobacco Association and by the local boards of trade, and voluntarily accepted by, farmers, warehousemen and manufacturing companies.

When one considers the number of factors which limit the sale of tobacco, it is apparent that reasonable regulations are necessary to promote the efficient sale of tobacco. The necessity for coordinating the functions of the farmer, warehouseman, buying companies, government graders and redrying facilities within the framework of limiting factors of time and quantity is apparent, and it is apparent that any appreciable interference with this finely balanced coordinating process could throw the entire system into chaos.